

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs
MERCHANT MARINER'S DOCUMENT NO. 538 56 9326
Issued to: Albert L. CAIN

DECISION ON THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2385

Albert L. CAIN

This appeal has been taken in accordance with 46 U.S.C. 7702(b) and 46 CFR 5.30-1.

By order dated 5 June 1984, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's seaman's document upon finding proved the charge of conviction for a dangerous drug law violation. The specification found proved alleged that while being the holder of the above-captioned document, on or about 3 September 1975, Appellant was convicted in the Superior Court of King County, Washington, a court of record, for the possession of heroin.

The hearing was held at Seattle, Washington, on 5 June 1984.

At the hearing, Appellant elected to act as his own counsel, with the assistance of non-professional counsel, and entered a plea of guilty to the charge and specification.

The Investigating Officer introduced in evidence six exhibits.

In defense, Appellant testified in his own behalf and introduced in evidence nine exhibits.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved by plea. He then served a written order on Appellant revoking all documents issued to Appellant.

The entire decision was served on 6 June 1984. This appeal was timely filed on 8 June 1984 and perfected on 27 August 1984.

FINDINGS OF FACT

On 3 September 1975 Appellant was convicted, pursuant to his plea of guilty, of possessing heroin in violation of the Uniform Controlled Substances Act of Washington, in the King County Superior Court in Seattle, Washington. Appellant's plea was negotiated in return for dismissal of another count and an

recommendation as to the sentence. He was sentenced to a maximum term of five years in prison. The King County Superior Court is a court of record in the State of Washington.

On 17 June 1975 Seattle Police searched Appellant's home pursuant to a warrant. During the search Appellant "swallowed a spoon of extremely high quality heroin." Appellant's stomach was pumped and about 2 grams of heroin in a balloon were recovered. Appellant was charged with possession of heroin and possession of more than 40 grams of marijuana. Appellant pled guilty to the heroin charge pursuant to a plea bargain. In return for the plea, the Prosecuting Attorney moved to dismiss the marijuana charge and recommended a three-year deferred sentence with 180 days' confinement be imposed. The maximum sentence for the count he pled guilty to, possession of heroin, is 5 years. Appellant spent 10 months in prison, 10 months in an honor camp, and completed his sentence in a half-way house.

In March of 1981 Appellant enrolled in the maritime training course at the Seattle Opportunities Industrialization Center (SOIC). SOIC conducted a Coast Guard approved program which allowed successful students to qualify for oiler's endorsements. Appellant stated that an SOIC instructor told him that the Coast Guard only wanted to know about drug offenses which occurred within the previous seven years.

On 21 July 1982 Appellant applied for a Merchant Mariner's Document. On his Seaman's Certificate Appellant form, Appellant answered "NO" to, and initialed, two questions concerning his narcotic record. The first question asked whether he had ever been convicted of a violation of the narcotic drug laws of the United States or any state. The second asked whether he had ever used or been addicted to the use of narcotics. The reverse of the application form contained a statement which warns applicants that falsely answering the drug law conviction and narcotic use questions can result in nullification or revocation of the document and in criminal prosecution. Appellant signed the statement certifying he read and understood this warning. On 29 July 1982 Appellant was issued Merchant Mariner's Document No. 538-56-9326.

Since receiving his document, Appellant has worked seasonally on board the NOAA vessel RANIER. Appellant submitted various letters from NOAA personnel attesting to his competence and good character.

The Investigating Officer stated that the 22-month interval between issuance of a document to Appellant and charging him with a drug law conviction resulted from the delay inherent in the FBI record search. Once the Coast Guard received the FBI report that Appellant had a conviction, charges were brought against him.

At the hearing, the Administrative Law Judge explained Appellant's rights and informed him that he was required to enter an order of revocation if the charge was found proved. Appellant persisted in his plea of guilty.

BASES OF APPEAL

This appeal is taken from the order of the Administrative Law Judge. Appellant urges that:

1. The Coast Guard should be estopped from applying 46 U.S.C. 7704 against him because he relied, to his detriment, on advice given to him by personnel at the Coast Guard approved school and because the Coast Guard did not advise him as to the correct way to complete the application form.

2. The Doctrine of Laches prevents the Coast Guard from exercising the discretion to charge Appellant with violating 46 U.S.C. 7704 after Appellant had held a document for 22 months.

3. The hearing should be re-opened.

4. The three-year waiting period in 46 CFR 5.13 should be waived and he should be allowed to immediately apply for a document.

OPINION

I

Appellant asserts that the Coast Guard should be estopped from applying 46 U.S.C. 7704 against him. I do not agree.

Appellant's guilty plea waives all non-jurisdictional defects and defenses. Appeal Decision 2268 (HANKINS). Further, Appellant raises the defense of equitable estoppel for the first time on appeal. Had Appellant pleaded "not guilty" and asserted this defense at the hearing, both he and the Investigating Officer could have presented all evidence relevant to this issue. Since he did not do this, it is too late to assert this defense.

II

Appellant contends that the Doctrine of Laches prevents the Coast Guard from charging him with violation of a dangerous drug law. I do not agree.

As discussed above concerning the first basis for appeal,

Appellant's guilty plea and failure to raise this issue below constitute a waiver of this defense.

In addition, Appellant's argument concerning laches is foreclosed by the terms of 46 U.S.C. 7704(b) and 46 CFR 5.05-23. Congress specifically stated that drug convictions within 10 years subject a license to revocation and the applicable regulation allows service of charges within that time. Thus, bringing an action within 10 years of the conviction is expressly authorized. Appeal Decision 2303 (HODGMAN).

In any event, laches only applies where an Appellant shows the delay was inexcusable and that he was prejudiced by that delay. Appeal Decisions 1382 (LIBBY), 1480 (BRIANT), 2064 (WOOD), 2253 (KIELY), and 2270 (HEBERT). Any delay here resulted from the time needed to search files and determine if Appellant had a criminal narcotics record. Appellant submitted no evidence that the time needed to search for his criminal record was inexcusable. Further, Appellant submitted no evidence that he was prejudiced.

III

Appellant asks that the hearing in his case be reopened pursuant to 46 CFR 5.25. His request is denied.

Appellant does not offer any newly discovered evidence as required by 46 CFR 5.25(a). Therefore, there is no basis for reopening the hearing.

IV

Appellant also requests that I waive the three-year waiting period in 46 CFR 5.13 so that he may immediately reapply for a document. I decline to do so.

Waiver of the three year waiting period has been allowed where an Appellant has a long period of exemplary service under a license or document following his offense and has clearly demonstrated his rehabilitation. Appeal Decisions 2303 (HODGMAN) and 2338 (FIFER). Such waivers have not been granted where the offense is recent or evidence of rehabilitation is weak. Appeal Decisions 2377 (HICKEY) and 2330 (STRUDWICK).

Appellant submitted eight letters of recommendation. Seven were from current or former crewmen of the NOAA ship RAINIER. In particular, Appellant's Commanding Officer, his former Executive Officer, and the Chief and First Assistant Engineers all spoke favorably of him and indicate that his potential for continued employment and advancement was good. None of these recommendations

concern Appellant's personal life or off-duty habits regarding drug use. The last recommendation was from SOIC, the maritime training school Appellant attended, and indicates he was a committed student actively involved in the affairs of the school. Appellant submitted no evidence concerning his personal life or his reputation in the community.

In addition, Appellant did not reveal his drug conviction to the Coast Guard. This withholding of information raises doubts as to Appellant's rehabilitation. In FIFER, I was impressed with the seaman's forthright disclosure of his prior narcotics violation to prospective employers. Here, Appellant concealed his conviction although he received a written warning of possible consequences.

Appellant claims that he thought the Coast Guard was only interested in convictions within the last seven years. Even if this were correct, he should have disclosed his conviction. He applied for a document in July of 1982 and had been convicted in September of 1975, less than 7 years earlier. Appellant knew the possible consequences of a false statement regarding narcotic violations and nonetheless certified that his application was true and correct.

There is no specific evaluation of Appellant's rehabilitation and fitness by the Administrative Law Judge in the record. I am not satisfied from the evidence submitted that Appellant is rehabilitated. A waiver of the time limits set forth in the regulations will not be granted. Appellant should submit any request for administrative clemency in accordance with the provisions of 46 CFR 5.13 and the time limits set forth therein.

CONCLUSION

Appellant's plea supports the findings of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations. The Administrative Law Judge properly revoked Appellant's seaman's document as required by regulation.

ORDER

The order of the Administrative Law Judge dated that Seattle, Washington, on 5 June 1984 is AFFIRMED.

J.S. GRACEY
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 20th day of March 1985.

